NO. 01-18-00538-CR

IN THE
COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

RICARDO ROMANO

V.

STATE OF TEXAS

Appealed from the
County Criminal Court at Law No. 6
of Harris County, Texas
Cause Number 2167075

BRIEF FOR APPELLANT

Josh Schaffer
State Bar No. 24037439

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
RICARDO ROMANO

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF THE PARTIES

Appellant:	Ricardo Romano
Trial Counsel:	Carl Haggard 1217 Prairie, Ste. 201 Houston, TX 77002
Appellate Counsel:	Josh Schaffer 1021 Main, Ste. 1440 Houston, TX 77002
Appellee:	The State of Texas
Trial Counsel:	Michael Mitchell 1201 Franklin Houston, TX 77002
Appellate Counsel:	Dan McCrory 1201 Franklin Houston, TX 77002
Trial Judge:	Honorable Larry Standley 1201 Franklin Houston, TX 77002

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STATEMENT OF THE CASE

Appellant pled not guilty to Class B misdemeanor indecent exposure in cause number 2167075 in the County Criminal Court at Law Number 6 of Harris County before the Honorable Larry Standley. He waived a jury trial. The court convicted him, assessed punishment at three days in the county jail and a $1,000 fine, and ordered him to register as a sex offender for ten years on May 18, 2018. Carl Haggard represented him at trial.

Appellant presents three issues on appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument because the case involves the application of well-established caselaw, and this Court can resolve the issues on the briefs.

ISSUES PRESENTED

1. Whether the evidence is legally insufficient to sustain appellant's conviction for indecent exposure.

2. Whether the trial court reversibly erred in admitting a police officer's improper personal opinion that appellant lied when he said that he was urinating in a park and that the officer believed that he was masturbating.

3. Whether appellant was denied the effective assistance of counsel at the guilt-innocence stage when counsel mentioned, elicited, and failed to object to testimony about and references to appellant's inadmissible prior conviction for indecent exposure.

STATEMENT OF FACTS

A. The Information

The information alleged that, on or about August 23, 2017, appellant unlawfully exposed his genitals to R. Gardiner with the intent to arouse and gratify appellant's sexual desire, and appellant was reckless about whether another person was present who would be offended and alarmed by the act, in that he masturbated in a public park (C.R. 7).

B. The State's Case

Houston Police Department Sergeant Ryan Gardiner was assigned to mounted patrol in Memorial Park, a public place, on August 23, 2017 (1 R.R. 9-10). He rode his horse to a remote part of the park about 10:30 a.m. and concealed himself behind the trees and bushes (1 R.R. 11-12, 28).

Appellant parked his car in an empty, nearby parking lot (1 R.R. 12, 48). No one else was in the lot or on the street, and no pedestrians or bicyclists were in the area at the time (1 R.R. 30-31, 50). A bike trail was about 100 feet away from appellant's car (1 R.R. 31). Gardiner was suspicious because there were "very few reasons" to park there (1 R.R. 12).[1] Appellant exited, walked around and opened the passenger door, and went to the rear of his car (1 R.R. 13, 31-32).

Gardiner watched appellant through an opening in the wood line (1 R.R. 13).

[1] Gardiner did not explain why it was suspicious to park a car in a parking lot in a public place in the middle of the day.

Appellant pulled down the top of his shorts with one hand and began to masturbate with his other hand (1 R.R. 14, 32).[2] Gardiner asserted that he saw appellant's penis but did not know if it was circumcised (1 R.R. 45). Gardiner stated on his body camera video that appellant started "messing with" his penis, and it "looked like" he was masturbating (1 R.R. 41; 3 R.R. SX 2). Gardiner assumed that appellant was doing this to gratify himself (1 R.R. 14). Gardiner called his partner over the radio and rode toward appellant as soon as he saw appellant masturbating (1 R.R. 14, 43-44). About one minute transpired from when appellant pulled into the parking lot until when Gardiner called his partner (1 R.R. 40-41).

Appellant saw Gardiner approach and reached into the car (1 R.R. 15). Gardiner arrested appellant for indecent exposure about 12:17 p.m. (1 R.R. 15, 28-29). Appellant immediately denied masturbating, said that he was trying to urinate, and asked Gardiner to review his body camera video footage (1 R.R. 15, 41-42). Appellant asked Gardiner why he would masturbate with no one around (1 R.R. 45). Gardiner did not see any urine on the ground, and a restroom was across the street (1 R.R. 15-16). He searched appellant's car but did not find anything that could be used to aid masturbation (1 R.R. 39-40).

Gardiner was the only person who saw appellant masturbating (1 R.R. 16). However, there was a risk that other pedestrians and motorists in the park could

[2] Gardiner had binoculars but did not use them after appellant parked (1 R.R. 33, 38-39).

have seen him, and he disregarded that risk (1 R.R. 16-17). Gardiner admitted that appellant's car may have blocked him from anyone using the bike trail (1 R.R. 33).

C. The Defense's Case

Appellant, age 48, pulled his car into Memorial Park to review some paperwork on his way downtown (1 R.R. 56-58). He parked near some bushes on the edge of a parking lot and exited to urinate by his car (1 R.R. 58-59, 64). He did not believe that it was reckless to urinate there, and he was not masturbating (1 R.R. 59-60). As soon as he pulled out his penis, he heard branches move (1 R.R. 60-61). No one was around, and he suspected that someone was behind the bushes (1 RR. 61). He did not actually urinate because Gardiner emerged before he could do so (1 R.R. 62). He did not expect to see anyone there, and no one else was present other than Gardiner (1 R.R. 63).

D. The Arguments

The prosecutor argued during summation that Gardiner "was convinced" that he saw appellant masturbating (1 R.R. 69).

Defense counsel replied that Gardiner was mistaken about what he saw because he was far away from appellant (1 R.R. 69-70). No one else was present other than Gardiner, who was hiding in the bushes (1 R.R. 70-71). Appellant was not reckless about whether someone was present who would be offended and alarmed, no matter what he was doing.

E. The Verdict And Sentence

The court convicted appellant of indecent exposure, assessed punishment at three days in the county jail and a $1,000 fine, and ordered him to register as a sex offender for ten years (C.R. 59-62; 1 R.R. 71; 2 R.R. 19-21, 24). The court stated that the prosecution's direct examination of Officer Gardiner "wasn't the best" but that the verdict "boiled down to credibility" (1 R.R. 77).

SUMMARY OF THE ARGUMENT

The evidence is legally insufficient to sustain appellant's conviction for indecent exposure. No rational trier of fact could have found beyond a reasonable doubt that appellant exposed his genitals with intent to arouse or gratify his sexual desire. The police officer's body camera video, which depicts his view of the incident, does not demonstrate that appellant was masturbating, as opposed to urinating. Nor is the evidence sufficient that appellant was reckless about whether another person was present. The evidence unequivocally demonstrated that no one was present other than the officer, who secretly concealed himself behind trees and bushes and could not be seen. This Court must set aside the judgment of conviction and issue an appellate acquittal.

The trial court reversibly erred in admitting the police officer's improper personal opinion that appellant lied when he said that he was urinating and that the officer believed he was masturbating. A witness may not give an opinion

regarding the truth or falsity of another witness's testimony, and a police officer may not give an opinion that the defendant is guilty. The error affected appellant's substantial rights because the prosecutor asserted, and appellant agreed, that the case turned on the conflict between his testimony that he was urinating and the officer's testimony that he was masturbating; and the trial court stated that the verdict "boiled down to credibility." This Court must set aside the conviction and remand for a new trial.

Appellant was denied the effective assistance of counsel during the guilt-innocence stage of trial because counsel mentioned, elicited, and failed to object to testimony about and references to appellant's inadmissible prior conviction for indecent exposure. The prior conviction was inadmissible because it was remote. Counsel's strategy to allow the court to hear about it to explain why appellant did not use a public restroom to urinate was unsound under the circumstances. No evidence could have prejudiced appellant more than allowing the court to learn that he had been convicted of the same offense for which he was on trial. The court may well have convicted him of the charged offense because it knew about his prior conviction. Thus, counsel was ineffective in this regard, and this Court must set aside the conviction and remand for a new trial.

FIRST POINT OF ERROR

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR INDECENT EXPOSURE.

STATEMENT OF FACTS

The pertinent facts are set forth supra at pages 2-4.

ARGUMENT AND AUTHORITIES

A person commits the offense of indecent exposure if he exposes any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act. TEX. PENAL CODE § 21.08(a) (West 2018). "Expose" means to lay open to view. McGee v. State, 804 S.W.2d 546, 547 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

Appellant does not dispute that he exposed his genitals, as he admitted that he removed his penis from his shorts to urinate (1 R.R. 66). However, the evidence was legally insufficient to establish two essential elements of the offense: (1) that he exposed his genitals with intent to arouse or gratify the sexual desire of any person and (2) that he was reckless about whether another person was present.

A. Standard Of Review

A challenge to the legal sufficiency of the evidence requires the appellate court to consider the evidence in the light most favorable to the verdict to

determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Byrd v. State, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). A court may hold that evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt that the defendant committed the offense. Jackson, 443 U.S. at 314, 320.

The State may prove criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. Gardner v. State, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). It must prove both the requisite culpable mental state and the prohibited act to convict the defendant. Bounds v. State, 355 S.W.3d 252, 255 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A culpable mental state can be inferred from the acts, words, and conduct of the defendant. Patrick v. State, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995).

B. The Evidence Is Legally Insufficient To Establish That Appellant Exposed His Genitals With Intent To Arouse And Gratify His Sexual Desire.

A person commits the offense of indecent exposure if, *inter alia*, he exposes any part of his genitals with intent to arouse or gratify the sexual desire of any person. Thus, if appellant exposed his genitals without intending to arouse or gratify the sexual desire of any person, he did not commit indecent exposure. If he

exposed his penis to urinate, he did not intend to arouse or gratify the sexual desire of any person. However, if he exposed his genitals to masturbate, he intended to arouse or gratify someone's sexual desire. The resolution of this element of the offense turned on whether the evidence was sufficient to establish that he was masturbating.

Thank goodness for the advent of police body cameras. If there were not a body camera video recording of the incident depicting exactly what Sergeant Gardiner saw from his perspective, then the Court would have to rely exclusively on Gardiner's testimony to resolve this issue. Although he testified that he saw appellant masturbating (1 R.R. 14, 16, 32), he stated at the time of the incident that appellant started "messing with" his penis, and it "looked like" he was masturbating (1 R.R. 41; 3 R.R. SX 2). Given the distance from which he viewed appellant—which was substantial—and his limited sight line that was obscured by tree branches and bushes, his assertions that appellant started "messing with" his penis and that it "looked like" he was masturbating are equally consistent with removing his penis from his shorts and holding it to urinate. Alas, the Court need not rely solely on Gardiner's testimony.

Fortunately, Gardiner's body camera video depicts that he did not, in fact, see that appellant was masturbating (3 R.R. SX 2). The video, which is of excellent quality, shows that Gardiner was too far away from appellant to see what

he was doing and that Gardiner could not have seen that appellant was masturbating, even if he was. The video unequivocally demonstrates that the area was vast and completely unoccupied by anyone other than appellant. The tree branches and bushes obscured Gardiner's view. It was impossible for him to determine that appellant was masturbating. With the benefit of the video, the Court cannot credit Gardiner's testimony over what the video actually depicts.

In short, the video rebuts Gardiner's testimony and establishes that no rational trier of fact could have found *beyond a reasonable doubt* that appellant exposed any part of his genitals with intent to arouse or gratify his sexual desire. The Court must issue an appellate acquittal. Cf. Beasley v. State, 906 S.W.2d 270, 272 (Tex. App.—Beaumont 1995, no pet.) (legally insufficient evidence of exposure element, although defendant naked below waist, where complainant did not see genitals because defendant's hand "shielded" penis).

C. The Evidence Is Legally Insufficient To Establish That Appellant Was Reckless About Whether Another Person Was Present.

A person commits the offense of indecent exposure if, *inter alia*, he is reckless about whether another is present who will be offended or alarmed by his act. The offense requires that the defendant actually expose himself to another person. Young v. State, 976 S.W.2d 771, 773-74 (Tex. App—Houston [1st Dist.] 1998, pet. ref'd) (citing McGee, 804 S.W.2d at 547). However, the person to whom the exposure is directed is not an essential element of the offense. Wallace

v. State, 550 S.W.2d 89, 91 (Tex. Crim. App. 1977).

The evidence was undisputed that no one else was present other than Gardiner, who concealed himself behind trees and bushes so appellant could not see him (1 R.R. 11-12, 16, 28, 30-31, 50). No one was in the parking lot or on the street, and no pedestrians or bicyclists were in the area (1 R.R. 30-31, 50). A bike trail was about 100 feet away from appellant's car, but no one was using it during the incident (1 R.R. 31). Gardiner admitted that appellant's car may have blocked anyone who was using the bike trail from seeing what he was doing (1 R.R. 33). Where appellant could not see that Gardiner was hiding behind the trees and bushes, the evidence was insufficient to establish that he actually exposed himself *to* another person. See Young, 976 S.W.2d at 773-74.

The central issue is whether appellant was reckless about whether another person was present where the evidence unequivocally established that the only person in the area, Gardiner, was concealed from appellant's view behind trees and bushes. A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial risk that the circumstances exist or the result will occur. TEX. PENAL CODE § 6.03(c). The risk may be of such nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the

actor's standpoint. Id. The objective standard is viewed through the eyes of the ordinary person standing in appellant's shoes. Hefner v. State, 934 S.W.2d 855, 857 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd).

The cases that address the recklessness element of indecent exposure involve a common feature absent from appellant's case. In those cases in which the evidence of recklessness was sufficient, the defendant knew that others were present but argued that he was not reckless that they would be offended or alarmed by his conduct. See, e.g., Young, 976 S.W.2d at 774 (evidence sufficient to establish recklessness where defendant exposed penis to companion at interstate highway public rest stop next to walking trail where he saw and spoke with another person on trail); Hefner, 934 S.W.2d at 857-58 (evidence sufficient to establish recklessness where defendant in adult book and movie store inserted penis through "glory hole" in wall of private booth, knowing that another person was in booth on other side of wall); McGee 804 S.W.2d at 548 (evidence sufficient to establish recklessness where defendant in clothing store dressing room masturbated knowing that others were present in dressing area and curtain on dressing room did not close completely); Swire v. State, 997 S.W.2d 370, 371-73 (Tex. App.—Beaumont 1999, no pet.) (evidence sufficient to establish recklessness where defendant masturbated in backyard knowing next door neighbor, who was in her backyard doing chores, could see him); Broussard v. State, 999 S.W.2d 477, 483 (Tex.

App.—Houston [14th Dist.] 1999, pet. ref'd) (evidence sufficient to establish recklessness where defendant masturbated in adult bookstore theater in presence of at least three other visible persons); Hankins v. State, 85 S.W.3d 433, 435-36 (Tex. App.—Corpus Christi 2002, no pet.) (evidence sufficient to establish recklessness where defendant in adult bookstore booth with undercover police officer masturbated and touched officer's genital area).

In contrast to these other cases, in appellant's case, the evidence established that no one was present other than a police officer who deliberately concealed himself in a place where no ordinary person would expect another person to be. Stated otherwise, there was no evidence that appellant was aware of, but consciously disregarded, a substantial risk that anyone was hiding behind trees and bushes. Even viewed from the standpoint of an objectively ordinary person standing in appellant's shoes, no one would have been aware of the risk—let alone a substantial risk—that another person would be "present" in a public park by hiding behind trees and bushes. Big brother may be watching us, but society has not reached the point where ordinary people must be "aware of a substantial risk" that others conceal themselves in places to spy on the rest of us. What comes next: Does a married couple who engages in sexual intercourse in the privacy of their heavily landscaped backyard commit an offense because they are reckless about whether a nosy neighbor will fly a drone with a video recorder over their property

and capture the act? Does a person who masturbates in the vast acreage of the supposed privacy of his secluded rural residential property commit an offense because he is reckless about whether a nosy neighbor with a high-powered telescope—think Jimmy Stewart in "Rear Window"—will peep on him from 200 yards away? Or worse, must we all now be "aware of a substantial risk" that the police are using their increasingly intrusive technology to watch us at all times, no matter where we are, no matter what we are doing?

The evidence was legally insufficient to establish that appellant committed the offense of indecent exposure. No rational trier of fact could have found beyond a reasonable doubt that appellant exposed his genitals with intent to arouse or gratify his sexual desire, nor that he was reckless about whether another person was present. This Court must set aside the judgment of conviction and issue an appellate acquittal.

SECOND POINT OF ERROR

THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING A POLICE OFFICER'S IMPROPER PERSONAL OPINION THAT APPELLANT LIED WHEN HE SAID THAT HE WAS URINATING IN A PARK AND THAT THE OFFICER BELIEVED THAT HE WAS MASTURBATING.

STATEMENT OF FACTS

Gardiner watched appellant from behind the trees and bushes through an opening in the wood line (1 R.R. 13). After appellant exited his car, he pulled

down the top of his shorts with one hand and began to masturbate with his other hand (1 R.R. 14, 32). Gardiner had binoculars but did not use them at that time (1 R.R. 33, 38-39). Gardiner stated on the video that appellant started "messing with" his penis, and it "looked like" he was masturbating (1 R.R. 41; 3 R.R. SX 2). Gardiner assumed that appellant was doing this to gratify himself (1 R.R. 14).

Immediately after the arrest, appellant denied masturbating and said that he was trying to urinate (1 R.R. 15). The prosecutor asked Gardiner, "Did you believe this?" He replied, "No." The court overruled counsel's objection to Gardiner's improper opinion—"to his belief."

ARGUMENT AND AUTHORITIES

A. The Trial Court Erred In Admitting Evidence Of A Police Officer's Improper Personal Opinion That Appellant Was Not Truthful.

A witness may not give an opinion regarding the truth or falsity of another witness's testimony. See, e.g., Miller v. State, 757 S.W.2d 880, 883 (Tex. App.—Dallas 1988, pet. ref'd).[3] Police opinion testimony that appellant was not telling the truth, and by inference that the police believed that he committed indecent

[3] Texas courts have consistently reversed convictions for sex offenses where a witness improperly expressed the opinion that the complainant was telling the truth, had been sexually assaulted, or was incapable of fantasizing about the type of sexual conduct allegedly committed against her. Farris v. State, 643 S.W.2d 694 (Tex. Crim. App. 1982) (psychiatrist); Black v. State, 634 S.W.2d 356 (Tex. App.—Dallas 1982, no pet.) (counselor at rape crisis center); Kirkpatrick v. State, 747 S.W.2d 833 (Tex. App.—Dallas 1987, pet. ref'd) (psychologist); Martin v. State, 819 S.W.2d 552 (Tex. App.—San Antonio 1991, no pet.) (DHS caseworker); Yount v. State, 872 S.W.2d 706 (Tex. Crim. App. 1993) (pediatrician); Matter of G.M.P., 909 S.W.2d 198 (Tex. App.—Houston [14th Dist.] 1995, no writ) (police detective).

exposure, was inadmissible under Rule of Evidence 702. Cf. Schutz v. State, 957 S.W.2d 52, 59-60, 70, 73 (Tex. Crim. App. 1997) (expert testimony that child sexual assault complainant did not exhibit any evidence of fantasizing and that allegations were not result of fantasy constituted inadmissible opinions on truth of allegations). The State cannot properly elicit over objection the opinion testimony of a police officer that a defendant is guilty. Cf. Prince v. State, 20 S.W. 582, 583 (Tex. Crim. App. 1892) (witness cannot testify to belief that defendant not guilty); Boyde v. State, 513 S.W.2d 588, 590 (Tex. Crim. App. 1974) (reversible error to elicit police officer's opinion that defendant guilty). A police officer cannot testify that he found evidence to connect the defendant to the offense, Tillery v. State, 5 S.W. 842, 845 (Tex. App. 1887); that he believes that the defendant is guilty, Parham v. State, 244 S.W.2d 809, 809 (Tex. Crim. App. 1952); or that he has never filed a complaint against someone whom he thought was not guilty. Clay v. State, 276 S.W.2d 843, 845 (Tex. Crim. App. 1955).[4] Defense counsel would have been ineffective had he failed to object to this testimony. Weathersby v. State, 627 S.W.2d 729, 730-31 (Tex. Crim. App. 1982) (counsel ineffective in failing to object to inadmissible police opinion testimony that defendant guilty).

[4] See also United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985) (prosecutor called to testify to circumstances surrounding accomplice's plea bargain improperly gave opinion that case against defendant was extremely strong).

Gardiner was not qualified as an expert on masturbation, urination, or determining whether a person is truthful. He could not properly give an expert opinion that appellant was untruthful when he denied masturbating and said that he was urinating. Rather, it was the court's role as the factfinder to observe and assess appellant's credibility based on the court's own experience with masturbation, urination, and determining credibility. "Clearly, there is nothing to be gained by permitting a witness to proffer an opinion on a subject when any other person in the courtroom, any member of the jury, could form an opinion on the issue equally readily and with the same degree of logic as the witness." Holloway v. State, 613 S.W.2d 497, 500 (Tex. Crim. App. 1981). Stated more simply, the court does not need the opinion of a witness for what "any fool can plainly see." Cooper v. State, 23 Tex. 331, 342-43 (1859). An opinion that amounts to little more than a witness choosing sides on the outcome of the case is inadmissible because it is not helpful. Mowbray v. State, 788 S.W.2d 658, 668 (Tex. App.—Corpus Christi 1990, pet. ref'd). Accordingly, the trial court erred in overruling appellant's objection to Gardiner's improper opinion that appellant was untruthful about the ultimate issue.

B. Harm

The erroneous admission of improper opinion testimony is non-constitutional error. This Court must disregard the error if it did not affect

appellant's substantial rights. TEX. R. APP. P. 44.2(b); Barshaw v. State, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. Coble v. State, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). Non-constitutional error is harmless unless "the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error." Barshaw, 342 S.W.3d at 94. In making this determination, the Court reviews the record as a whole. The burden to demonstrate harm does not rest on appellant.

Gardiner's opinion that appellant was dishonest about the most important issue in the case affected his substantial rights because it was highly prejudicial and attacked appellant's credibility. The prosecutor asked appellant, "[T]he main issue in this case is you're saying you were urinating and the officer is saying you're masturbating?" (1 R.R. 66). Appellant agreed that the case turned on that issue. When announcing the verdict, the court stated that the prosecution's direct examination of Gardiner "wasn't the best" but that the verdict "boiled down to credibility" (1 R.R. 77).

Where the outcome of the trial depended on the credibility of appellant versus Gardiner, as well as the inconclusive police video footage, the erroneous admission of Gardiner's improper opinion on the ultimate issue had a substantial and injurious effect or influence on the verdict. Accordingly, this error harmed

appellant's substantial rights. TEX. R. APP. P. 44.2(b); see Aguilera v. State, 75 S.W.3d 60, 66 (Tex. App.—San Antonio 2002, pet. ref'd) (improper admission of expert testimony regarding truthfulness of complainant's allegations adversely affected defendant's substantial rights and required new trial). The Court must set aside the judgment and remand for a new trial.

THIRD POINT OF ERROR

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE STAGE WHEN COUNSEL MENTIONED, ELICITED, AND FAILED TO OBJECT TO TESTIMONY ABOUT AND REFERENCES TO APPELLANT'S INADMISSIBLE PRIOR CONVICTION FOR INDECENT EXPOSURE.

STATEMENT OF FACTS

Six weeks before trial, counsel filed a motion in limine seeking to exclude, *inter alia*, evidence that appellant previously was arrested or convicted of any crimes (C.R. 35). Three weeks before trial, the State gave notice of its intent to use evidence of appellant's prior conviction for indecent exposure in 1999 (C.R. 50). The court granted the motion in limine (C.R. 55-58).

On cross-examination of Sergeant Gardiner, defense counsel attempted to establish the reason why appellant did not use the public restroom across the street to urinate (1 R.R. 42-43). Counsel elicited from Gardiner that appellant said that he did not want to go there, but Gardiner did not remember his reason. Counsel asserted that appellant "talked about it being smelly," to which Gardiner replied,

"Okay." Counsel then engaged in the following exchange (1 R.R. 43):

> Q. Did you know he was previously arrested at a bathroom in 1999?
>
> A. Well –
>
> Q. You looked it up, his record?
>
> A. I know now, yes.

On redirect examination, the prosecutor then asked Gardiner without objection, "[A]t that point [the arrest] did you know that the defendant had a prior conviction for indecent exposure?" (1 R.R. 47). Gardiner replied no.

Counsel asked appellant about public bathrooms on direct examination (1 R.R. 63):

> Q. Everybody knows about Memorial Park and the bathrooms. Men are arrested for Indecent Exposure who meet – like the officers were saying – they meet out there, and they go into the woods or something or the bathroom. So why were you wanting [to] avoid the bathroom?
>
> A. Well, prior conviction. I just – I wanted nothing to do with that kind of bathroom.

The prosecutor then elicited from appellant on cross-examination without objection that he had a prior conviction for indecent exposure from 1999 (1 R.R. 65).

ARGUMENT AND AUTHORITIES

A. Standard Of Review

Appellant had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; Powell v. Alabama, 287 U.S. 45 (1932). Counsel

must act within the range of competence demanded of counsel in criminal cases. McMann v. Richardson, 397 U.S. 759 (1970).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient—that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense—that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. Ultimately, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The defendant need not show a reasonable probability that, but for counsel's errors, he would have been acquitted, received a mistrial as a result of a

deadlocked jury, or had his conviction reversed on appeal. Rather, the issue is whether he received a fair trial resulting in a verdict worthy of confidence. Id.

An appellate court cannot resolve an ineffective assistance of counsel claim on direct appeal in the absence of an adequate record. Thompson v. State, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999). However, where counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. Massaro v. United States, 538 U.S. 500, 508 (2003); Robinson v. State, 16 S.W.3d 808, 813 (Tex. Crim. App. 2000). This disposition alleviates the unnecessary judicial redundancy and burden on trial courts of holding additional hearings in writ applications when no additional evidence is necessary to dispose of the case. Thompson, 9 S.W.3d at 817 (Meyers, J., dissenting).

An appellate court must presume that counsel's performance was based on a sound trial strategy. Strickland, 466 U.S. at 689. However, appellant can rebut that presumption if the court can determine from the record that counsel's performance was not based on sound trial strategy. Ramirez v. State, 987 S.W.2d 938, 944-45 (Tex. App.—Austin 1999, no pet.). The conviction must be reversed where "the record demonstrates that no plausible purpose was served by counsel's failure to object . . . ." Id. at 945. See also Robertson v. State, 187 S.W.3d 475, 484 (Tex. Crim. App. 2006) (introducing defendant's prior convictions that were

inadmissible because on appeal); Andrews v. State, 159 S.W.3d 98 (Tex. Crim. App. 2005) (failing to object to improper argument harmful to defendant); Stone v. State, 17 S.W.3d 348, 353 (Tex. App.—Corpus Christi 2000, pet. ref'd) (eliciting testimony regarding defendant's inadmissible murder conviction cannot be sound trial strategy); Mares v. State, 52 S.W.3d 886, 893 (Tex. App.—San Antonio 2001, pet. ref'd) (failing to object to probation officer's testimony that defendant was not good candidate for probation was contrary to strategy of obtaining probation); Storr v. State, 126 S.W.3d 647, 653 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (failing to request punishment instruction on voluntary release of kidnap victim in safe place cannot be sound trial strategy).

B. Deficient Performance

Evidence of appellant's 18-year-old conviction for Class B misdemeanor indecent exposure would have been inadmissible had the State offered it in the first instance because more than ten years had elapsed since the date of conviction. TEX. R. EVID. 609(b).[5] "Remote convictions are inadmissible because of a presumption that one is capable of rehabilitation and that his character has reformed over a period of law abiding conduct." Morris v. State, 67 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

[5] Rule 609(a) would not have prohibited the admission of the prior conviction because indecent exposure is a crime of moral turpitude. Tristan v. State, 393 S.W.3d 806, 812-13 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

Having determined that appellant's prior indecent exposure conviction was inadmissible, this Court next determines if counsel had a sound strategic reason for mentioning it in the first place, eliciting it, and then failing to object to testimony and references to it. The record suggests that counsel intended to introduce the prior conviction to explain why appellant did not use the public restroom across the street to urinate. The question is whether that strategy was reasonable. The Court can decide this issue even though there was not a motion for new trial at which counsel provided an explanation because his conduct served no plausible purpose. Ramirez, 987 S.W.2d at 944-45.

This case is controlled by Lyons v. McCotter, 770 F.2d 529 (5th Cir. 1985), and Ex parte Menchaca, 854 S.W.2d 128 (Tex. Crim. App. 1993). In Lyons, the defendant was charged with aggravated robbery. The State elicited without objection that he had previously been convicted of robbery. The Fifth Circuit held that counsel performed deficiently in failing to object. "To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence, as here, has no strategic value." Lyons, 770 F.2d at 534. "We can hardly imagine anything more prejudicial to [the defendant] than allowing the jury in his armed robbery case to hear the prosecutor's comments that [he] had been convicted twice before of burglary and once on drug charges. The jury may well have convicted [him] of

the charged offense because it was aware of his prior convictions." Id.

Similarly, in Menchaca, the defendant was charged with delivery of a controlled substance. 854 S.W.2d at 128. The State elicited on cross-examination of the defendant without objection that he previously had been convicted of rape. Id. at 129. The prior conviction was inadmissible because he received probation, and the period of probation expired without revocation, so it was not a final conviction. Id. at 131. The jury's verdict turned on the defendant's credibility, and the evidence of his prior rape conviction caused the jury not to believe his testimony because the jury had to weigh his credibility against the State's primary witness. Id. at 132-33. His prior conviction "permeated the entire guilt-innocence phase." Id. at 133. The Court of Criminal Appeals concluded that counsel performed deficiently in failing to object to the inadmissible prior conviction, which undermined the defendant's credibility, "which was at the very heart of his defense." Id. Counsel's conduct could not be considered sound. Id. Because counsel's deficient performance caused prejudice, he was ineffective, and the Court granted habeas corpus relief and set aside the conviction.

Likewise, appellant's counsel performed deficiently in mentioning, eliciting, and failing to object to testimony about and references to appellant's inadmissible prior conviction for indecent exposure. No sound strategy could justify this conduct, especially where the prior conviction was for the same offense as the

charged offense. Any possible benefit that flowed from explaining why appellant did not use the public restroom was outweighed by the extreme prejudice that resulted from the court's learning that appellant previously was convicted of the same offense. Counsel performed deficiently because his strategy was plainly unreasonable.

C. Prejudice

There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Appellant need not show a reasonable probability that, but for counsel's errors, he would have been acquitted, received a mistrial as a result of a deadlocked jury, or had his conviction reversed on appeal. Rather, the issue is whether he received a fair trial resulting in a verdict worthy of confidence. Id.

Counsel's unreasonable conduct that allowed the court to learn that appellant previously was convicted of indecent exposure—where he was on trial for indecent exposure—devastated the defense. This inadmissible evidence pervaded the entire trial—it was emphasized four times during a trial that lasted less than three hours with only two witnesses whose testimony spanned only 58 pages (1 R.R. 4, 8-66). The case turned on whether the court believed appellant's testimony that he was urinating and not masturbating. Evidence of his prior conviction destroyed the credibility of his denial. As the trial court stated, the verdict "boiled down to

credibility" (1 R.R. 77). This Court cannot have confidence in the verdict in light of counsel's deficient performance.

Accordingly, this case presents one of the rare occasions where, on direct appeal and in the absence of a motion for new trial, an appellate court must conclude that counsel was ineffective because no plausible strategy could justify conduct that resulted in clear, extreme prejudice. This Court must set aside the judgment and remand for a new trial. Menchaca, supra; Robertson, supra; Andrews, supra; Stone, supra; Mares, supra; Storr, supra.

CONCLUSION

This Court must set aside the judgment of conviction and issue an appellate acquittal or, alternatively, remand for a new trial.

Respectfully submitted,

/S/ *Josh Schaffer*

Josh Schaffer
State Bar No. 24037439

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
RICARDO ROMANO

CERTIFICATE OF SERVICE

I served a copy of this brief on Dan McCrory, assistant district attorney for Harris County, by electronic service on October 30, 2018.

/S/ *Josh Schaffer*
Josh Schaffer

CERTIFICATE OF COMPLIANCE

I certify that, according to the word count of the computer program used to create this document, it contains 6,362 words, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.

/S/ *Josh Schaffer*
Josh Schaffer